Supreme Court, U.S.
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No. 04-1447

In the Supreme Court of the United States

TAMELA Q. SIMMONS,

Petitioner,

v.

NEVADA LANDING PARTNERSHIP, ELGIN RIVERBOAT RESORT, d/b/a GRAND VICTORIA RIVERBOAT and RBG LIMITED PARTNERSHIP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit's dismissal of the petitioning – intervenors' appeal as untimely was correctly decided under a straightforward application of the Federal Rules of Appellate Procedure, where the notice of appeal was filed four days after the 30-day appeal period had run, and no request for an extension of time was ever filed by intervenors, notwithstanding the Seventh Circuit's express invitation for them to do so.

PARTIES TO THE PROCEEDING

All parties to the proceeding below are not reflected in the case caption. The other appellants in the Seventh Circuit Court of Appeals were: Dorothy N. Burks, Katrina Dismuke Cureton, Ramona Camprindo, Robert Curtington, Darryl W. Donahue, Donna D. Jackson, Delores Miller, Keith Moody, Evelyn D. Norris, Wellington Okoh, Noelle Olivier, James Reaves, Jennifer Thomas, Tamara Turner, and Lawrence D. Williams.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondents Elgin Riverboat Resort d/b/a Grand Victoria Casino, Nevada Landing Partnership, and RBG, L.P., make the following disclosures:

1. *Identify any parent corporations:*

   Elgin Riverboat Resort is a general partnership that is 50 percent owned by Nevada Landing Partnership and 50 percent owned by RBG, L.P. Nevada Landing Partnership is wholly-owned by MGM/Mirage.

2. *Identify any publicly-held corporation that owns ten percent or more of Respondents' stock:*

   None.

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Respondents, Elgin Riverboat Resort d/b/a Grand Victoria Casino, Nevada Landing Partnership and RBG, L.P. (hereinafter collectively "Grand Victoria"), respectfully pray that this Court enter an order denying the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by the Petitioner, Tamela Q. Simmons ("Simmons").

OPINIONS BELOW

The opinions of Judge Gottschall contained in Simmons' Appendix at pages 3-15 are not relevant to the matters sought to be reviewed by this Petition. In addition to the orders and opinions cited by Simmons, the Seventh Circuit's unpublished order dated November 1, 2004 is relevant to the issues raised herein.

JURISDICTION

Grand Victoria concurs that jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

Grand Victoria disagrees that Rule 24(c) of the Federal Rules of Civil Procedure is relevant to the determination made by the Seventh Circuit Court of Appeals that Simmons' appeal was untimely. In addition to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure cited by Simmons, Rules 4(a)(5) and 26(b), Fed. R. App. P., are also relevant to the Seventh Circuit's determination.

Rule 4(a)(5), Fed. R. App. P., provides, in pertinent part, as follows:

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

Rule 26(b), Fed. R. App. P., provides, in pertinent part, as follows:

(b) **Extending Time.** For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; . . .

STATEMENT OF THE CASE

A. The District Court Proceedings

This Title VII lawsuit was brought in the fall of 1998 by plaintiffs Lisa Ellis, Marcia English, and Yvonne Mason (since deceased), on behalf of themselves and a putative class of African-American applicants for dealer positions, alleging that Grand Victoria discriminated against them on the basis of race in the hiring process. Derrick Denson was later added

as a fourth named plaintiff. App. 21, 54, and 59.[1] Near the incipiency of this case and after a limited discovery period, plaintiffs moved for class certification. Several months later, on March 27, 2000, Judge Gottschall, the district court judge then presiding over this case, certified a class even though plaintiffs had not established the requisite numerosity. App. 2-13. Nevertheless, the District Court found that "plaintiffs have conditionally established numerosity," while noting that "[t]he court has the option under Rule 23(c)(1) of decertifying the class later." App. 9.

On November 5, 2001, Magistrate Judge Ashman presided over a settlement conference. Because it appeared that the parties had reached an agreement in principle as to the overall monetary amount of the class settlement, even though other significant issues remained in controversy, Magistrate Judge Ashman entered an order reflecting settlement, but set the case for further status. Shortly thereafter, pursuant to 28 U.S.C. § 636(c) and Local Rule 73.1(b), and with the parties' unanimous consent, this case was reassigned to Magistrate Judge Ashman for the purpose of conducting any and all proceedings including entry of a final judgment. R. 56 and 57; App. 16 n. 1. Over the course of the ensuing months, it became apparent that the parties did not have a meeting of the minds over many material aspects of the class settlement. Eventually, on March 15, 2002, Magistrate Judge Ashman held a hearing on the parties' competing motions with respect to the purported

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[1] References to Simmons' Appendix will be abbreviated as "App." followed by the page numbers. References to Simmons' Petition for Writ of Certiorari will be abbreviated as "Pet." followed by the page number. Items in the District Court record will be referred to by their docket entry number and abbreviated as "R. __" followed by the docket entry number.

class settlement. The hearing confirmed that the parties were at loggerheads over numerous issues. R. 102, Transcript of Proceeding, March 15, 2002 ("Tr."). Indeed, class counsel conceded at the March 15 hearing that they did not have their clients' agreement even to the tentative settlement terms discussed back in November 2001. R. 102, Tr. at 16-19. Accordingly, Magistrate Judge Ashman concluded that there was obviously no meeting of the minds and, hence, no agreement. Nevertheless, in an effort to conclusively determine if settlement could be reached, Magistrate Judge Ashman ordered the parties to appear before him for another settlement conference. At the renewed settlement conference that took place on May 29, 2002, the parties were unable to reach an agreement. R. 71.

Based upon substantial additional discovery that took place in the latter half of 2002, Grand Victoria moved to decertify the class. App. 22. On August 21, 2003, Magistrate Judge Ashman granted Grand Victoria's motion in a 33-page opinion. App. 16-53. The District Court found no evidence of a pattern and practice of race discrimination uniting the plaintiffs' claims with those of the class as a whole. In particular, the District Court cited, *inter alia*, Grand Victoria's highly-decentralized hiring process as well as the abundance of individualized proof that would be necessary to resolve each class member's claim as militating against the findings of commonality and typicality required under Rule 23(a), Fed. R. Civ. P. App. 36-50. Put differently, the Court found neither anecdotal nor statistical evidence that race discrimination was a standard operating procedure at Grand Victoria. Plaintiffs' request for interlocutory review of the District Court's decertification ruling was denied by the Seventh Circuit.

Grand Victoria next proceeded to move for summary judgment on the individual claims of the two remaining plaintiffs, Lisa Ellis and Marcia English. The other plaintiffs, Denson and a representative of Ms. Mason's estate, had, in the interim, settled with Grand Victoria. App. 54 n.1. The attorneys for Ellis, English, and the putative class sought and were granted leave to withdraw. R. 107. After considerable delay, plaintiffs Ellis and English eventually located new counsel. Plaintiffs' new counsel, however, was unable to respond to Grand Victoria's motion, which was eventually granted on September 21, 2004. App. 54-68. In granting summary judgment for Grand Victoria, the District Court found that neither Ellis nor English was able to make out a *prima facie* case of race discrimination because they could not show, as a matter of law, that (a) they were qualified for the dealer position, or (b) the position was given to someone of a different race who had similar or lesser qualifications. App. 62-68.[2]

On October 6, 2004, just two weeks after the District Court's entry of final judgment, Simmons' counsel informed one of Grand Victoria's attorneys of his intention to file a petition to intervene on behalf of certain putative class members to appeal the order decertifying the class. The following day, October 7, Simmons' counsel reiterated his intent to pursue intervention on the ground that he was certain

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[2] In the first half of 2004, while Grand Victoria's summary judgment motion was pending, one of the former attorneys for the putative class, Mr. Flaxman, who is also the attorney for Petitioner Simmons herein, filed five individual lawsuits on behalf of 16 former putative class members. Simmons, however, never filed a charge of discrimination with the Equal Employment Opportunity Commission or otherwise pursued an individual claim after the decertification of the class.

that Ellis and English would not be pursuing an appeal. 7th Cir. Record, November 22, 2004, Defendants-Appellees' Reply in Support of Motion to Dismiss Appeal ("Reply Br."), Exh. A, Affidavit of Joel Rice. Simmons' counsel did not file his petition to intervene, however, until two weeks later on October 20, 2004. The petition itself acknowledged an awareness on the part of Simmons' counsel that Ellis and English "have shown little interest in prosecuting their individual claims and have no interest whatsoever in serving as the champion of the interests of the unnamed members of the putative class." R. 127, Pet. to Intervene, ¶ 3, p. 2. The petition was filed on behalf of 16 would-be intervenors, of whom all but Simmons were simultaneously pursuing individual actions. Even though the petition was filed 28 days after the entry of final judgment, no attempt was made to have it heard on an emergency basis. Rather, it was noticed up on the District Court's regular motion call for October 26 – four days after the period for appeal had run. R. 127.

At the October 26, 2004 hearing on the petition to intervene, Simmons' counsel conceded that he had not to date filed a notice of appeal. Although the District Court granted the petition to intervene, the Court stressed that it took "no position on whether the appeal is valid in view of the fact that no notice of appeal has been filed to date. That's up to the Seventh Circuit." 7th Cir. Record, November 4, 2004, Mot. To Dismiss Appeal as Untimely, Exh. A, Transcript of Proceedings, p. 11. Later that day, a notice of appeal was filed for the first time.

B. Proceedings Before The Court Of Appeals

Grand Victoria moved to dismiss the petitioning-intervenors' appeal on the ground that it was untimely filed. In the interim, the Seventh Circuit had issued an order on

November 1, 2004 pointing out that the notice of appeal was filed four days late. The Seventh Circuit further noted that "[t]he district court has not granted an extension of the appeal period, *see* Rule 4(a)(5), and this court is not empowered to do so, *see* Fed. R. App. P. 26(b)." 7th Cir. Record, Order, November 1, 2004. Therefore, the court of appeals ordered the appellants to file a memorandum of law stating why the appeal should not be dismissed for lack of jurisdiction. The Seventh Circuit went on to invite the appellants to file an appropriate motion for extension of time in which to file a notice of appeal in the District Court "as soon as possible." *Id.* The appellants filed a jurisdictional memorandum, to which Grand Victoria responded. At no point, however, did the appellants, including Simmons, file a motion with the District Court to extend the time for filing a notice of appeal.

On January 26, 2005, a Seventh Circuit panel consisting of Judges Easterbrook, Rovner, and Manion issued an unpublished order dismissing the appeal as untimely. App. 1-2. Contrary to Simmons' contention, the Seventh Circuit made no reference to its prior opinion in *Roe* v. *Town of Highland*, 909 F.2d 1097 (7th Cir. 1990). Rather, the dismissal rested upon the appellate court's application of Rule 4(a), Fed. R. App. P., which requires that a notice of appeal be filed within 30 days of the entry of final judgment. The Seventh Circuit pointedly added that the District Court had not granted an extension of the appeal period "for the simple reason that appellants never asked the district court to do so (although this court suggested this course of action in its November 1, 2004 order) . . .". App. 2.

REASONS FOR DENYING THE WRIT

Review by this Court of the decision dismissing the appeal below is neither necessary nor warranted. Contrary to Simmons' contention, the Seventh Circuit's determination that the appeal was untimely is not in conflict with this Court's decision in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). *McDonald* dealt with the issue of whether a putative class member's post-judgment request to intervene was timely under Rule 24(b), Fed. R. Civ. P. The Seventh Circuit's decision had nothing to do with the timeliness or propriety of intervention. Rather, the decision rested upon a straightforward interpretation of Rule 4 of the Federal Rules of Appellate Procedure, which requires that a notice of appeal be filed within 30 days of the entry of final judgment, unless an extension of time has been obtained. Furthermore, Simmons falsely raises the spectre of a conflict between *McDonald* and the Seventh Circuit's 15-year-old decision in *Roe* v. *Town of Highland*, 909 F.2d 1097 (7th Cir. 1990). Even if there were any conflict between the two decisions, which there is not, this case would not be an appropriate vehicle to address the issue because there is no indication that the Seventh Circuit relied upon *Roe* in issuing its order of dismissal, which cited solely to the applicable Federal Rules of Appellate Procedure. In any event, *Roe* involved a unique "procedural tangle" (909 F.2d at 1098) not present in *McDonald* and does not in any way conflict with, or impinge upon, this Court's ruling in *McDonald*.

Furthermore, Simmons' petition fails to raise any important question of federal law that requires addressing by this Court. The Seventh Circuit's decision below was contained in an unpublished order and, therefore, is of no precedential weight. Moreover, the decision below was in the context of a unique and involved procedural history unlikely

to recur in any other case. Put bluntly, Simmons' counsel's dilatory conduct and cavalier disregard for the Federal Rules of Appellate Procedure was what prompted the dismissal, rather than any interpretation of federal law by the Seventh Circuit requiring this Court's attention.

A. The Seventh Circuit's Dismissal Of The Appeal As Untimely Does Not Conflict With This Court's Decision In *United Airlines, Inc.* v. *McDonald.*

Simmons' contention that the routine dismissal of her appeal conflicts with this Court's decision in *McDonald* rests on a misreading of both *McDonald* as well as the rationale for the Seventh Circuit's decision. Contrary to Simmons' assertion, *McDonald* did not announce a "bright line rule" that so long as a putative class member's petition to intervene is filed within the 30-day period for taking an appeal, the notice of appeal will be deemed to have been timely filed on the date the petition was filed. Pet. 6. Rather, *McDonald* dealt with a different issue entirely – namely, whether a putative class member was required to intervene within the limitations period for bringing an individual suit established by this Court in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). The Court in *McDonald* concluded that the putative class member's post-judgment intervention was timely based upon the "critical fact . . . that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to enter the

litigation." *McDonald*, 432 U.S. at 394.[3] Although the Court in *McDonald* noted that the putative class member had filed her motion to intervene within the time period for taking an appeal, that observation was made in the context of assessing whether the intervenor had acted promptly enough for purposes of Rule 24(b), Fed. R. Civ. P., which governs intervention, not the time period for pursuing an appeal. Nowhere in *McDonald* is there any suggestion, express or implied, that the requirements of Rule 4(a) of the Federal Rules of Appellate Procedure are suspended for putative class members who seek to pursue an appeal.

In dismissing Simmons' and the other intervenors' appeal, the Seventh Circuit did not "refuse[] to follow" *McDonald*, contrary to Simmons' assertion. Pet. 5. As shown above, *McDonald* dealt with the narrow issue of whether intervention was timely sought. Here, the District Court granted the putative class members' request to intervene and the Seventh Circuit's dismissal had nothing to do with the propriety of that determination. Rather, the Seventh Circuit's ruling rested on a straightforward interpretation of Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure, which requires that a notice of appeal be filed within 30 days of entry of final judgment. The 30-day time period for appeal is, as this Court has stated, "mandatory and jurisdictional." *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S.

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[3] Unlike the intervenors in this case, the petitioning class member in *McDonald* acted with alacrity, filing her motion 18 days after the entry of final judgment, "well within the 30-day period for an appeal to be taken." 432 U.S. at 390. Here, by contrast, Simmons and the other intervenors waited until 28 days after entry of final judgment to file their petition, even though their counsel had expressed his clear intention to take such action two weeks earlier. 7th Cir. Record, November 22, 2004, Reply Br., Exh. A, Rice Aff.

257, 264 (1978)(internal citations omitted). Simmons and the other putative class members did not file their notice of appeal until four days after the appeal period had run, thus depriving the appellate court of jurisdiction. As the Seventh Circuit further noted – based upon a plain reading of the applicable rules – the intervenors never requested that the District Court grant an extension of the time to appeal, and the Court of Appeals lacks the power to grant such an extension. *See* Rule 4(a)(5) and Rule 26(b), Fed. R. App. P.[4] The Seventh Circuit's ruling presents no conflict with *McDonald*.

Simmons further contends that, in dismissing her appeal, the Seventh Circuit was following its earlier decision in *Roe* v. *Town of Highland*, 909 F.2d 1097 (7th Cir. 1990) – a decision that Simmons claims has "limited this Court's bright line rule" in *McDonald*. Pet. 5. Contrary to Simmons' contention, the Seventh Circuit's unpublished dismissal order makes no mention of *Roe*, but rather relies exclusively upon a plain reading of Rules 4 and 26 of the Federal Rules of Appellate Procedure. Hence, it is unnecessary to address the Seventh Circuit's 15-year old decision in *Roe*. Even if the order of dismissal here was influenced by *Roe*, that earlier Seventh Circuit decision does not conflict with *McDonald*. Rather, the decision in *Roe* was the product of a unique "procedural morass" (909 F.2d at 1100) not present in

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[4] Simmons' reference to *United States for Use and Benefit of Canion* v. *Randall & Blake*, 817 F.2d 1188, 1192 (5th Cir. 1987), is misplaced. Pet. 6. As Simmons acknowledges, *Randall & Blake* involved a motion to intervene for purposes of filing a complaint, not, as in *McDonald*, for the purpose of pursuing an appeal. In the quite different context presented by *Randall & Blake*, there was a statute of limitations that could not be extended. Here, by contrast, Rule 4(a)(5), Fed. R. App. P., expressly allows for an extension of the appeal period.

McDonald. The proposed intervenor in *Roe*, Ms. Morgan, filed her motion to intervene 29 days after entry of final judgment. *Id*. at 1098. The district court did not rule on Morgan's motion to intervene. In the meantime, Morgan's attorney simultaneously pursued a timely appeal on behalf of the putative class representative. The class appeal was ultimately dismissed with prejudice for lack of prosecution. *Id*. Morgan did not request a ruling from the district court on her pending motion to intervene until one day before the class appeal was dismissed with prejudice. By the time the district court took up Morgan's motion, the appeal had been dismissed. Accordingly, the district court denied Morgan's motion on the ground that there was no action pending for Morgan to join. Morgan appealed from that determination. *Id*.

The Seventh Circuit in *Roe* held that, given the unique procedural tangle presented by that case, the district court did not abuse its discretion by denying Morgan's motion to intervene. 909 F.2d at 1100. In its affirming opinion, the Seventh Circuit cited *McDonald* as illustrating the correct procedure to be followed in these cases. The court noted that in *McDonald* the intervenor had filed her motion 18 days after entry of final judgment, and that the better course of action is for the moving party to "allow the district court sufficient time to rule on the motion." *Roe*, 909 F.2d at 1099. The Seventh Circuit further observed, however, that a potential intervenor has several avenues available for assuring that a timely appeal is taken, even if, unlike in *McDonald*, the matter is not likely to be ruled upon within the originally allotted 30-day time period. Those avenues include (a) filing the petition to intervene as an emergency motion so the matter can be ruled upon within the 30-day period for an appeal; (b) requesting an extension of time to file the appeal, as permitted by Fed. R. App. P. 4(a)5); or (c) filing a timely

notice of appeal followed by a request for remand to the district court to resolve the issue of intervention. *Id.* at 1099-1100. While the Seventh Circuit's dicta in *Roe* is instructive with respect to the situation faced by Simmons and the other intervenors here, nothing in that decision is inconsistent with this Court's holding in *McDonald*.

B. The Dismissal Of Simmons' Appeal As Untimely Does Not Raise Any Important Federal Question Requiring Resolution By This Court.

The Seventh Circuit's dismissal of Simmons' appeal as untimely in no way conflicts with or impinges upon this Court's decision in *McDonald*. Nor does Simmons' petition raise any important question of federal law that requires addressing by this Court. *First*, the Seventh Circuit order that is the subject of this petition is unpublished and therefore of no precedential weight or import. *See* 7th Cir. Rule 53(b)(2)(iv) ("[e]xcept to support a claim of res judicata, collateral estoppel or law of the case," unpublished orders "shall not be cited or used as precedent"). *Second*, as Grand Victoria's statement of the case shows in greater detail, this matter involves a highly unusual and involved procedural background that is unlikely to recur in any other case. Moreover, there will be few, if any, instances where a former class counsel, knowing that his former clients, the putative class representatives, will not be pursuing an appeal, nevertheless waits until the eleventh hour to file a petition to intervene on behalf of other putative class members, and takes no steps to preserve a right of appeal, including filing a motion to extend time under Rule 4(a)(5), Fed. R. App. P., despite an express invitation from the court of appeals that such a course of action be taken. In sum, no larger federal issue is raised by this case. Rather, the Seventh Circuit's dismissal of the appeal was the inevitable consequence of the

dilatory conduct of Simmons' counsel, who cavalierly disregarded the plainly applicable Federal Rules of Appellate Procedure.

CONCLUSION

For all of the foregoing reasons, Grand Victoria respectfully requests that this Court deny Simmons' Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

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